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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1951

No. 584

PAUL D. LYNCH,
Petitioner,

vs.

HOWARD J. GRUBER and ISABEL GRUBER,
husband and wife,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

HUGH M. MATCHETT,
DAVID F. MATCHETT, JR.,
WALTER F. DODD,
Chicago, Ill.

NED HALL,
Vancouver, Wash.

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Dated: Chicago, Ill., February 4th, 1952.

BARNARD & MILLER, 33 S. Market St., Chicago 6. FRanklin 2-0562

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States.

Your petitioner, Paul D. Lynch, respectfully prays for a writ of certiorari herein to review a final judgment of the Supreme Court of the State of Washington (Rec. 150), being the highest Court of said State, by which decision the said Court affirmed a judgment of the Superior Court of Clark County, Washington, after trial by the court sitting without a jury, that petitioner's complaint be dismissed at

his costs (Rec. 12) and that his motion for a new trial be denied (Rec. 14).

The action is one for treble damages under Section 205 (e) of the Emergency Price Control Act of 1942 as amended (Section 925e, 50 U.S.C. App. 901 et seq.). It is based on a violation of Section 9 of the Rent Regulation for Housing (10 Fed. Reg. 13528) which was in force during July and August, 1946. The cause of action arose in Chicago, Illinois.

Opinions below.

The opinion of the Supreme Court of Washington is reported as 234 P. 2d 529. It is printed in the Transcript of Record beginning at page 132. The opinion of the trial court is printed in the Transcript of Record beginning at page 9.

Jurisdiction.

The opinion of the Supreme Court of Washington was rendered and filed August 9th, 1951 (Rec. 132). A petition for rehearing filed September 7th, 1951 (Rec. 134), was denied October 3rd, 1951 (Rec. 150), and judgment was entered on that date (Rec. 150). Time for filing a petition for writ of certiorari, which would otherwise have expired January 2nd, 1952, was extended to and including February 15th, 1952, by order of Mr. Justice Douglas dated December 20th, 1951 (Rec. 154).

The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

Questions presented.

1. Whether, in common law terminology, it is necessary for a plaintiff to prove that a relationship of landlord and tenant existed between the defendant and himself at the time of the transaction of which he complains in order for

him to recover a judgment for treble damages under the Emergency Price Control Act of 1942 as amended.

2. Whether proof that respondents, who were tenants in possession of an apartment subject to rent control, required petitioner to purchase their furniture as a prerequisite of surrendering occupancy of the apartment, and assigning or relinquishing whatever right to possession they may have had, to him, the consideration ostensibly paid for the furniture being in excess of the value of the furniture and in addition to the rental that the landlord was entitled to and did receive, would entitle the petitioner to recover a judgment for treble damages under the Emergency Price Control Act of 1942 as amended; and, if so, whether the entire consideration ostensibly paid for the furniture would be the overcharge or only that portion of the consideration paid in excess of the actual value of the furniture.

3. Whether the Supreme Court of the State of Washington has proceeded in such a manner that all substantive rights of petitioner under controlling Federal law have been protected, including the law of the State of Illinois if and insofar as the same may be applicable to the situation under the controlling Federal law.

The statute.

Section 205(e) of the Emergency Price Control Act of 1942 as amended provides:

> "If any person selling a commodity violates a regulation * * * the person who buys such commodity * * * may * * * bring an action against the seller on account of the overcharge. * * * For the purposes of this section the payment or receipt of rent * * * shall be deemed the buying or selling of a commodity, as the case may be. * * *".

It further provides:

> "and the word 'overcharge' shall mean the amount by which the consideration exceeds the applicable maximum price."

The Act provides:

> "The term 'price' means the consideration demanded or received in connection with the sale of a commodity,"

and

> "the term 'rent' means the consideration demanded or received in connection with the use or occupancy or the transfer of a lease of any housing accommodations." (Section 302 b, g.).

Section 205(e) further provides:

> "In such action, the seller shall be liable for reasonable attorney's fees and costs as determined by the court, plus * * * such amount not more than three times the amount of the overcharge, or the overcharges, upon which the action is based, as the court in its discretion may determine. * * *; provided, however, that such amount shall be the amount of the overcharge or overcharges * * * if the defendant proves that the violation of the regulation, order, or price schedule in question was neither wilful nor the result of failure to take practicable precautions against the occurrence of the violation."

See Appendix I "A."

The rent regulation for housing.

Section 2 of the Rent Regulation For Housing provides in part:

> "No person shall demand or receive any rent for or in connection with use or occupancy * * * of any housing accommodations * * * higher than the maximum rents provided by this regulation."

Section 13(10) states:

> "'Rent' means the consideration, including any bonus, benefit, or gratuity, demanded or received for or in connection with the use or occupancy of housing accommodations or for transfer of a lease of such accommodations."

Section 9(a) provides:

> "General. The maximum rents and other requirements in this regulation shall not be evaded, either directly or indirectly, in connection with the renting or leasing or the transfer of a lease of housing accommodations, by way of absolute or conditional sale, sale with purchase money or other form of mortgage, or sale with option to repurchase, or by modification of the practices relating to payment of commissions or other charges or by modification of the services furnished with housing accommodations, or by tying agreements or otherwise."

Section 9(b) provides:

> "Purchase of property as condition of renting. Specifically, but without limitation on the foregoing, no person shall require a tenant or prospective tenant to purchase or agree to purchase furniture or any other property as a condition of renting housing accommodations (Amdt. 44, 1-8-45) unless the prior written consent of the Administrator is obtained (Amdt. 67, 9-10-45)."

Section 13(9) provides:

> "'Tenant' includes a subtenant, lessee, sublessee, or other person entitled to the possession or to the use or occupancy of housing accommodations."

Section 13(8) states:

> "'Landlord' includes an owner, lessor, sublessor, assignee or other person receiving or entitled to receive rent for the use or occupancy of any housing accommodations, or an agent of any of the foregoing."

Section 10 provides:

> "Persons violating any provision of this regulation are subject to criminal penalties, civil enforcement actions and suits for treble damages as provided for by the Act."

See Appendix I "B."

STATEMENT.

Petitioner claims that respondents, who themselves were tenants, required him, a prospective tenant, to purchase their furniture in the apartment occupied by them for $2,500.00 as a condition of surrendering possession of their apartment and assigning or relinquishing whatever right of occupancy they may have had to him; that hence, in the language of the Rent Regulation for Housing (10 Fed. Reg. 13528), the Emergency Price Control Act of 1942 as amended (50 U.S.C. App. 901 et seq.), and the Amended Complaint (Rec. 7) which is couched in the general verbiage of the Regulation and the Act, respondents "rented" petitioner an apartment and required as a condition of "renting" said apartment that he purchase the furniture therein for the sum of $2,500.00: that as the payment made was in addition to the rent the landlord was entitled to and did receive it was an overcharge; and, consequently, petitioner is entitled to judgment against both respondents for $7,500.00 plus attorneys' fees and costs in the trial court and attorneys' fees and costs incident to review on appeal and certiorari (Rec. 5-6).

Respondents in their answer deny the allegations of the amended complaint and set up the defense that the purported cause of action was barred by limitations and the partial defense that any violation was not wilful (Rec. 7).

Petitioner denies the affirmative defenses (Rec. 18).

The trial court found that petitioner looked to the respondents for the furniture and to the landlord for possession of the premises (Rec. 108): that there were two separate transactions (Rec. 108): and, in any event, the cause of action, if any, accrued on July 28th, 1946, the date the preliminary negotiations were completed, more than a year before the commencement of the action on August 5th, 1947 (Rec. 1), and it is, therefore, barred by limitations (Rec. 106-108; 9-12).

Appeal was taken to the Supreme Court of Washington (Rec. 14) and twenty-seven Assignments of Error were assigned (Rec. 129) involving twenty-one questions (Brief of Appellant, pp. 1-7). The Supreme Court of Washington affirmed the judgment of the trial court (Rec. 134) on the sole ground that the relationship of landlord and tenant between respondents and petitioner never came into existence (Rec. 134). Petitioner filed a Petition for Rehearing (Rec. 134) which was denied (Rec. 150) and final judgment was entered against him (Rec. 150).

Petitioner now petitions this court for a writ of certiorari to issue to the Supreme Court of Washington to review that judgment. Sixteen errors are specified.

Facts.

On and prior to July 28, 1946, respondents occupied an apartment and paid rental at the rate of $45.00 a month. This was the amount fixed by a rent regulation. The rental contract expired April 30, 1946. Respondents continued their occupancy with the consent of the landlord at the same rental. Respondents desired to leave Chicago and to sell their furniture. Petitioner and his family had recently arrived in Chicago and were looking for an apartment.

Petitioner responded to an advertisement in a newspaper by respondents (Rec. 132).

The advertisement appeared in the Classified Advertising Section of the Chicago Sunday Tribune of July 28, 1946, on page 3 under the "To Rent—Apartments—North" column reading: "Very lovely lg. 4 rm. apt.—comp. furn. for sale; exc. n. side loc. Edg. 0287" (Pl. Ex. 1, Rec. 109).

Petitioner and his wife told respondents that they wanted an apartment (Rec. 21; 55). They asked about the nature of the furnishings that had been advertised for sale and inquired concerning the possibility of securing possession of the premises without purchasing the furnishings (Rec. 21; 34; 56). Respondents said it would be impossible to let the premises go without selling the furniture because they wanted to go to the west coast and it would be necessary to have the money from the sale of the furniture to do so (Rec. 21-22; 56). They said there was another couple interested in getting the apartment who had $2000.00 and only needed $500.00 more in order to get it (Rec. 24; 53; 62). Petitioner told respondents that he and his wife would have to give the matter further consideration (Rec. 24; 69) and they left the apartment (Rec. 24; 56; 80). After discussing the matter in the hallway they decided to meet respondents' demand, returned to the apartment, and informed them they had decided to take the apartment and buy the furniture (Rec. 80). Mr. Gruber told petitioner that while the landlord had consented to a transfer of the premises if Mr. Gruber could find suitable tenants it would be necessary for petitioner to secure the approval of the landlord before he could move into the apartment (Rec. 23). He cautioned petitioner not to do anything to arouse the suspicion of the landlord and said he would have to introduce him as a personal friend (Rec. 23) which he did (Rec. 23). Petitioner then negotiated with the owner of the property to rent the apartment (Rec. 133).

The landlord refused to give petitioner a lease for a year but took his request for the apartment under consideration (Rec. 23-24; 35-36; 70).

Petitioner and Mr. Gruber returned to the Gruber apartment (Rec. 70). He gave respondents a check for $200.00 (Pl. Ex. 2, Rec. 110) which he delivered to Mr. Gruber with the understanding that he would have time to raise the additional $2300.00 they demanded as a condition for the surrender of the premises (Rec. 25), and he prepared a paper or bill of sale or receipt covering the contents of the apartment (Rec. 37; 97; 102-106). It stated that petitioner was buying the furniture on condition he could get occupancy of the apartment (Rec. 102-106). Petitioner wrote it down, read it out loud, had Mr. Gruber sign it, and retained it in his own possession (Rec. 37, 102-106), until either he or his wife destroyed or threw it away as being without value (Rec. 37; 105-106). The $200.00 check was deposited in a bank on August 5th, 1946, by an endorsee, and paid by the bank on which it was drawn on August 6th, 1946 (Pl. Ex. 2, Rec. 110).

The landlord notified respondents a few days later that petitioner could have the apartment and they in turn notified petitioner (Rec. 71, 82). Petitioner called on the landlord on August 12th, 1946, and apparently saw either the landlord or his wife (Rec. 73, 83) who told him (Rec. 36-37) that the landlord had no objection to renting the apartment to him if Mr. Gruber was willing to assign his lease (Rec. 24). Petitioner then called on respondents (Rec. 83). Mr. Gruber and a girl friend of his wife were present (Rec. 83). Mrs. Gruber asked her to wait in her son Larry's room because this was a business matter (Rec. 83). Petitioner handed Mr. Gruber a certified check for $2300.00 (Pl. Ex. 3, Rec. 110) payable to Howard J. Gruber and signed by petitioner bearing date August 12th, 1946 (Rec. 49). Mr.

Gruber endorsed it over to Isabel Gruber who deposited it in their account in Chicago (Rec. 49; 50). Respondents had paid some rental in advance, for which petitioner reimbursed them, and they vacated the premises so he might take possession August 15th (Rec. 133). Petitioner then became the tenant of the owner of the building, and the tenancy of respondents terminated (Rec. 133) but the contractual liability did not terminate (Rec. 136). Mr. Gruber assigned his lease to petitioner on August 12th or on the 15th when petitioner and his wife took possession of the apartment (Rec. 26-27). He was given the tenant's copy of the lease (Rec. 27) which had been signed by the landlord (Rec. 38). It had expired April 30th, 1946 (Rec. 38). Petitioner vacated the apartment the following February and assigned the lease over to the tenant who succeeded him to whom he sold his furniture including that which he had purchased from respondents (Rec. 38).

The sale of the furniture to petitioner was not approved by the Office of Price Administration or its representative (Rec. 76).

Petitioner and his wife and Mrs. Gruber between them gave a complete and detailed inventory of the furniture involved in the transaction. With a few exceptions they were in agreement concerning the items sold. Briefly the furniture consisted of four rooms of ordinary second-hand furniture, i.e., chairs, rugs, tables, radios, beds, dishes, sheets, pillow cases, child's toys, etc. The furniture did not include any major household equipment such as a refrigerator, washing machine, dishwasher, stove, piano, or electric heater, nor did it include any antiques. Petitioner and his wife testified the furniture was only in fair condition; respondents testified it was in good condition. Petitioner and his wife testified that many items, particularly bric-a-brac, had no value. Petitioner said the furniture was

worth $500.00 (Rec. 33). His wife placed the figure at $800.00 (Rec. 59). Mr. Gruber said the furniture was worth $3500.00 (Rec. 74). Mrs. Gruber said the furniture was worth $2500.00 and that its replacement value was $3500.00 (Rec. 96-97). Mrs. Gruber admitted on cross-examination that the furniture had been accumulated over a period of about twelve years (Rec. 46) and that the average age of the furniture was from five to six years (Rec. 48). There was no ceiling on the furniture at the time of sale.

Neither the trial court nor the Supreme Court of Washington made any finding concerning the value of the furniture.

SPECIFICATION OF ERRORS.

1. The Supreme Court of Washington erred in affirming the judgment of the trial court.

2. The decision of the Supreme Court of Washington is contrary to the law, the facts, and the law and the facts.

3. The Supreme Court of Washington erred in holding the tenancy of respondents terminated on August 15th, 1946, in the sense they were released from contractual liability to the landlord.

4. The Supreme Court of Washington erred in holding petitioner advanced the theory respondents with the consent of their landlord, *sublet* the apartment to petitioner for the remainder of their holdover term.

5. The Supreme Court of Washington erred in holding petitioner advanced the theory that *only* the amount paid *over* $800.00 was additional rental.

6. The Supreme Court of Washington erred in holding that petitioner advanced the theory that the amount paid was a bonus for *subletting* the apartment.

7. The Supreme Court of Washington erred in holding petitioner bases his right of recovery upon the claim that the common law relationship of landlord and tenant existed between respondents and himself.

8. The Supreme Court of Washington erred in holding that at the time of making the purchase of the furniture from respondents, petitioner *rented* the apartment *from* the owner of the building and not from respondents within the meaning of the word "*rented*" under the Rent Control Regulation For Housing and the Emergency Price Control Act of 1942 as amended by the Stabilization Extension Act of 1944.

9. The Supreme Court of Washington erred in holding that when respondents vacated the premises with the consent of the landlord their relationship of landlord and tenant ceased in the sense their contractual relationship terminated.

10. The Supreme Court of Washington erred in holding that the cited statutes of the state of Illinois and decisions of her courts had no application to the factual situation before it.

11. The Supreme Court of Washington erred in holding that in order for petitioner to recover in this action a landlord tenancy relationship between respondents and himself in a common law sense would have to be established.

12. The Supreme Court of Washington erred in holding that when we conclude that the relationship in a common law sense of landlord and tenant between respondents and petitioner never came into existence, it *follows* as a matter of course that the price control act and the regulation referred to have no application and give no remedy to petitioner.

13. The Supreme Court of Washington erred in its con-

struction of the amended complaint and in its failure to amend the amended complaint or to deem it amended to conform to the proof if the court did not believe that it did so.

14. The Supreme Court of Washington erred in disregarding petitioner's theory of an assignment of a lease and in not holding there was such an assignment.

15. The Supreme Court of Washington erred in holding that proof that respondents, who were tenants in possession of an apartment subject to rent control, required petitioner to purchase their furniture as a prerequisite of surrendering occupancy of the apartment, and assigning or relinquishing whatever right to possession they may have had, to him, the consideration ostensibly paid for the furniture being in excess of the value of the furniture and in addition to the rental that the landlord was entitled to and did receive, would not entitle the petitioner to recover for treble damages under the Emergency Price Control Act of 1942 as amended.

16. The Supreme Court of Washington erred in stating that under such circumstances the overcharge would only be the consideration paid in excess of the actual value of the furniture rather than the entire consideration paid.

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REASONS RELIED ON FOR ALLOWANCE OF WRIT.

I.

The Court is completely in error.

The determination of the Supreme Court of Washington that "when we conclude that the relationship of landlord and tenant between respondents and appellant never came into existence, it follows as a matter of course that the price control act and the regulations referred to have no application and give no remedy to appellant" (Rec. 134) is completely in error. In *Forat* v. *Rauer* (2nd Cir.), 192 F. 2d 861, 862, the court said:

> "Defendant's contention that the payment of a bonus to the assignor of a lease does not constitute an overcharge of rent in excess of the maximum permissible rent under the Emergency Price Control Act of 1942, as amended, 50 U.S.C.A. Appendix, §§ 904(a), 925(e), unless the relation of landlord and tenant exists, is without substance. Rent includes 'consideration * * * received for * * * the transfer of a lease.' Rent Regulation for Housing in New York City Defense-Rental Area § 13(10), 8 Fed. Reg. 13914. The recovery provisions of the Act are not conditioned upon a finding of the relation of landlord and tenant. *Fleming* v. *Chapman*, 2 Cir., 161 F.2d 345. The later legislation itself defines rent to include any 'bonus' demanded or received for the transfer of a lease. Housing and Rent Act of 1947, 50 U.S.C.A. Appendix § 1892(e)."

In *United States* v. *Thomas*, Civil Action No. 2767, U. S. D. Ct. Conn., unreported, printed in the Transcript of Record at pages 145 to 149, the court said:

> "Defendant urges that no violation of the Housing and Rent Act of 1947, as amended, has been shown

because here defendant was not a landlord and did not receive rent for the premises but was merely an occupant offering, on a stated condition, to vacate in favor of the Reids and thus facilitate their hope for tenancy. Sec. 825.8(b), Rent Regulations under the Housing and Rent Act of 1947, as amended, 14 F.R. 5711, states that '*no person* shall require a tenant or prospective tenant to purchase or agree to purchase furniture or any other property as a condition of renting.' And a violation of this regulation, I hold, has been established by the finding that the defendant, a tenant in occupancy, required the Reids to purchase the furniture as a condition to his surrender of the tenancy thus making it possible for the Reids to become tenants. This interpretation of the regulation is required by the underlying legislative policy, inherent in the Act, to prevent excessive, unearned private gain from the existing housing shortage: if an owner with a capital investment at stake was to be precluded from such unearned gain, *a fortiori* it was intended that one without any capital investment at stake, who might be classified as a bystander, should not be allowed to profit from the shortage. This view is not at variance with the wording of Sec. 205 of the Act which reads: '*any person* who demands, accepts, or receives any payment of rent in excess of the maximum . . .' shall be liable for the penalties imposed. Thus the doctrine of *Small* v. *Schultz*, 173 F.2d 940, is applicable here."

See also decision of the United States District Court for the Southern District of New York in *United States* v. *Edenor, Inc.*, Civil Action 48-720, a certified copy of which is printed in Appendix II.

It is worthy of note that the Supreme Court of Washington completely disregards the underlying policy of the Emergency Price Control Act of 1942 as amended:

"to eliminate and prevent profiteering, hoarding, manipulation, speculation, and other disruptive practices resulting from abnormal market conditions or scarcities caused by or contributing to the national emergency." (Sec. 1a, 50 U.S.C. App. 901a), (Appendix I).

It also ignores the special definitions of terms used in the Act and Regulation (Appendix I) when using those terms would solve the entire controversy. For a landlord and tenant relationship did exist between respondents and petitioner within the meaning of the term as used in the rent regulation. Section 13(8) states:

> "'Landlord' includes an owner, lessor, sublessor, assignee, or *other person receiving* or entitled to receive *rent* for the *use or occupancy* of any housing accommodations, or an agent of the foregoing." (Italics ours.)

Section 13(9) states:

> "'Tenant' includes a tenant, lessee, sublessee, or *other person* entitled to the *possession or use or occupancy* of housing accommodations." (Italics ours.)

This means of course entitled to possession or use or occupancy as against the person standing in the position of a landlord within the contemplation of the regulation because the words "landlord" and "tenant" have no meaning without reference to the other. Section 13(10) states:

> "'Rent' means the *consideration*, including any bonus, *benefit*, or gratuity, demanded or *received* for or in connection with the *use or occupancy* of housing accommodations or for the *transfer* of a lease of such accommodation." (Italics ours.)

If respondents, as petitioner claims and as the proof under any fair examination of this record establishes, required petitioner to purchase their furniture as a condition of surrendering occupancy of their apartment and assigning or relinquishing whatever right to possession they may have had to him, it can hardly be gainsaid that they demanded and received a consideration or benefit for or in connection with the use or occupancy of housing accommodations (i.e., *rent*) from petitioner who, as against them, before the transaction was not entitled to occupancy and use of

the apartment regardless of what his relationship to the owner may have been, and who, as against them, after the transaction was entitled to such occupancy and use, also regardless of what the relationship between him and the owner of the building may have been. By definition respondents were landlords and petitioner their tenant within the meaning of the Regulation.

II.

The precedent would seriously undermine rent control in the United States.

The determination of the Supreme Court of Washington that:

> "when we conclude that the relationship of landlord and tenant between respondents and appellant never came into existence, it follows as a matter of course that the price control act and the regulation referred to have no application and give no remedy to appellant." (Rec. 134),

is of paramount national importance since if permitted to stand as a precedent it would seriously undermine rent control in the United States. It would prevent the enforcement of The Emergency Price Control Act of 1942, as amended (50 U.S.C. App. 901, *et seq.*), and the Rent Regulation for Housing (10 F.R. 13528) and The Housing and Rent Act of 1947, as amended (50 U.S.C. App. 1891, *et seq.*), and the Controlled Housing Rent Regulation (14 F.R. 5711), which are now in force, against all persons other than landlords. It would permit such persons to do what the landlords themselves cannot do and which it was the intention of Congress that no one should be permitted to do, i.e., to profiteer from abnormal scarcities of housing accommodations caused by and contributing to the national

emergency (Sec. 1a, 50 U.S.C. App. 901a). It would open the way to all kinds of stratagems by landlords, smarting under what would then be discriminatory legislation, and others to evade rent control in communities where rent control is still necessary to the welfare of the community.

III.

There is a conflict in decisions between State Courts and Federal Courts.

The determination of the Supreme Court of Washington that:

> "when we conclude that the relationship of landlord and tenant between respondents and appellant never came into existence, it follows as a matter of course that the price control act and the regulations referred to have no application and give no remedy to appellant." (Rec. 134),

and a similar decision of the Supreme Court of New York in *Oakes* v. *Schinasi,* 66 N.Y.S. 2d 276 (Special Term), which for some reason or other the Supreme Court of Washington fails to cite in its opinion, where the court came to the same conclusion as the Supreme Court of Washington, are in direct conflict with the decision of the United States Court of Appeals, 2nd Cir., in *Forat* v. *Rauer,* 192 F.2d 861, and the decision of the United States District Court for the District of Connecticut in *United States* v. *Thomas,* Civil Action 2767, unreported, but a certified copy of which opinion is attached to the Petition for Rehearing and is printed at page 145 of the Transcript of Record, and the decision of the United States District Court for the Southern District of New York in *United States* v. *Edenor, Inc.,* Civil Action 48-720, unreported, a certified copy of which is printed in Appendix II. They are not in harmony with the decisions of the United States Courts of Appeals in:

Mahanor v. *United States* (1st Cir.), 192 F.2d 873; *United States* v. *Pileggi* (2nd Cir.), 192 F.2d 878; *Burton* v. *Katzman* (7th Cir.), 187 F.2d 703; *Hancock* v. *Eck* (7th Cir.), 183 F.2d 632; *Woods* v. *Willis* (5th Cir.), 171 F.2d 289; and *Bowles* v. *Rupple* (3rd Cir.), 157 F.2d 944; and decisions of United States District Courts in *Woods* v. *Gavensky* (U.S. D. C. D. Conn.), 88 F. Supp. 679; and *Woods* v. *Claving Realty Corporation* (U.S. D. C. S. D. N.Y.), 77 F. Supp. 533.

IV.

The Supreme Court of Washington has simply disregarded the federal statute and regulation.

The decision of the Supreme Court of the State of Washington is so completely in error that to permit it to stand as a precedent is merely to yield to the doctrine that each state can decide for itself whether an act of the federal government shall be enforced. Under such circumstances this Court did not hesitate to issue a writ of certiorari in *Testa* v. *Katt*, 67 S. Ct. 810, 330 U.S. 386, where it required the courts of the State of Rhode Island to entertain cases arising under the Emergency Price Control Act of 1942, anything in the law of that jurisdiction notwithstanding. It did not hesitate to do so in *Garrett* v. *Moore-McCormack*, 63 S. Ct. 246, 317 U.S. 239, where it held that:

> "Pennsylvania having opened its courts to petitioner to enforce federally created rights, the petitioner was entitled to the full scope of these rights." (63 S. Ct. 246, p. 253, 317 U.S. 239, pp. 248-249).

Both decisions are applicable here.

That the Supreme Court of Washington has a dislike of the whole system of Federal rent control is apparent in both the majority and minority opinions of the Supreme

Court of Washington sitting *in banc* in *Walker* v. *Gilman*, 25 Wn 2d 557, where the majority reluctantly decided to permit the courts of that state to entertain suits under the Emergency Price Control Act of 1942, and the minority wanted to follow the Rhode Island Supreme Court in refusing to do so. (In fairness—*Testa* v. *Katt*, 67 S. Ct. 810, 330 U.S. 386, had not yet been decided.)

Disregard is reflected throughout the present record and has apparently warped the judgment not only of the Supreme Court of Washington but of the trial court as well in reaching their conclusion that respondents are not subject to liability under the Emergency Price Control Act of 1942 for what they have done. For how else can one account for the conclusion of the Supreme Court of Washington that a landlord and tenant relationship is necessary to recovery when that act and the Rent Regulation For Housing make no such requirement an element of a cause of action; its failure to refer to and consider the policy behind the legislation in reaching a decision; its failure to refer to and consider the special definitions of "rent" and "landlord" and "tenant" used in the regulation and the act; its misstatement of petitioner's own theory of the case which is evidenced by its substitution of the word "sublet" for "assignment of a lease" and the assertion that "Appellant bases his right of recovery upon the claim that the relationship of landlord and tenant existed between respondents and himself" when the words "landlord" and "tenant" do not appear in either the pleadings or the briefs insofar as any relationship between respondents and petitioner is concerned; its refusal to consider whether there was an assignment of a lease under the Illinois statutes and common law and its refusal to consider the law of that state in determining the nature of respondents' tenancy which would support the theory that a lease had been assigned

between the parties to this litigation; and its failure to construe the amended complaint according to the special definitions used in the regulation and the act and in its failure to amend the amended complaint, or to deem it amended to conform to the proof if the court did not believe that it did so, which it had the power to do under Rule 6(9) Rules of Pleading, etc. and Rule 63, Rules on Appeal of the Supreme Court of Washington and the duty to do by Rule 63 Rules on Appeal (34A Wn. 2d 72, 65)? See Petition For Rehearing (Rec. 134-149) and appropriate references to briefs referred to therein. How else can one account for the conclusion of the trial court that the cause of action was barred by limitations when there could be no dispute but that $2300.00 was paid within the year period in which the suit was filed: its determination that petitioner looked to the landlord for possession of the apartment when the landlord did not have possession and could not get possession: and its finding of fact that petitioner first purchased the furniture and "then inquired of defendants about renting said apartment" when petitioner had no use for the furniture or place to keep it unless he obtained occupancy of the apartment and which contention respondents were forced to abandon in the Supreme Court because it could not stand examination (Reply Brief, pp. 2 to 7; and references therein to Brief of Respondents and Record; Brief of Appellant, pp. 82 to 101)?

It is a serious matter when the highest court of one of the states disregards an Act of Congress and the decisions of the Federal courts construing it and renders a decision which if permitted to stand will in any respect nullify the enforcement of the federal law in that jurisdiction as far as the state courts are concerned and prevent one who has earned a reward promised by the Federal Government from receiving it, which is what has happened in this case. Unless a citizen of one state can go into the courts of

a sister state and submit his cause to the courts of that state with the assurance that his federal rights will be protected, national policy will be frustrated at the enforcement level. The only way to insure that this country will remain an effective sovereign union is for this court to grant certiorari in those cases where the Federal law has not been enforced by the state courts. Certiorari should be granted in this case.

V.

This case presents an opportunity to settle the conflict ~~as to~~ in decisions among the Circuit Courts of Appeal as to whether in a suit based on a tie-in sale the overcharge is the entire consideration paid or only that portion in excess of the value of the secondary commodity.

If certiorari be granted it will give this Court an opportunity to settle a dispute that has arisen among the Circuit Courts of Appeal in regard to the method of determining the overcharge in a suit under the Emergency Price Control Act of 1942 based on a tie-in sale. The United States Court of Appeals for the Tenth Circuit on two occasions has held that the overcharge is the entire consideration paid without regard to the value of the secondary commodity. *Anchor Liquor Co.* v. *United States*, 158 F.2d 221; *Woods* v. *Turner*, 172 F.2d 313. Petitioner believes that view to be correct although admitting that a defendant has a right in a separate action to sue for and recover a judgment for the value of the secondary commodity and to have the execution on that judgment set-off against the execution on any judgment the plaintiff might obtain. The United States Court of Appeals for the Seventh Circuit holds that the amount of the overcharge is only that portion of the consideration paid

in excess of the value of the secondary commodity. *Small* v. *Schultz*, 173 F.2d 940. The majority of the Courts of Appeal follow the decision in *Small* v. *Schultz*, 173 F.2d 940. The controversy should be settled by this Court.

The question does not arise under the Housing and Rent Act of 1947, as amended, because under Section 205(a) of that act the overcharge is limited to liquidated damages (50 U.S.C. App. 1891, *et seq.*).

CONCLUSION.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

WALTER F. DODD,
Chicago, Ill.

HUGH M. MATCHETT,
Chicago, Ill.

DAVID F. MATCHETT, JR.,
Chicago, Ill.

NED HALL,
Vancouver, Wash.,

FRANK S. KETCHAM,
Washington, D. C.,
Counsel for Petitioner.

Dated: Chicago, Ill.
February 4th, 1952.

APPENDIX I

"A"

PERTINENT PROVISIONS OF THE EMERGENCY PRICE CONTROL ACT OF 1942, AS AMENDED BY STABILIZATION EXTENSION ACT OF 1944. (50 U.S.C. App. 901 et seq.)

PURPOSES OF ACT. Sec. 1 (a). It is hereby declared to be in the interest of the national defense and security and necessary to the effective prosecution of the present war, and the purposes of this Act are, to stabilize prices and to prevent speculative, unwarranted, and abnormal increases in prices and rents; to eliminate and prevent profiteering, hoarding, manipulation, speculation, and other disruptive practices resulting from abnormal market conditions or scarcities caused by or contributing to the national emergency. . . .

FIXING MAXIMUM RENTS Sec. 2 (b) . . . the Administrator may by regulation or order establish such maximum rent or maximum rents for such accommodations as in his judgment will be generally fair and equitable and will effectuate the purposes of this Act. . . .

EVASION Sec. 2 (g). Regulations, orders, and requirements under this Act may contain such provisions as the Administrator deems necessary to prevent the circumvention or evasion thereof.

UNLAWFUL CONDUCT Sec. 4 (a). It shall be unlawful, regardless of any contract, agreement, lease or other obligation heretofore or hereafter entered into, for any person to sell or deliver any commodity, or in the course of trade or business to buy or receive any commodity, or to demand or receive any rent for any defense-area housing accommodations, or otherwise to do or omit to do any

act, in violation of any regulation or order under section 2, or of any price schedule effective in accordance with the provisions of section 206, or of any regulation, order, or requirement under section 202 (b) or section 205 (f), or to offer, solicit, attempt, or agree to any of the foregoing.

OPA Price Adm. Sec. 201 (d). The Administrator may, from time to time, issue such regulations and orders as he may deem necessary or proper to carry out the purposes and provisions of this Act.

Treble Damage Actions Sec. 205 (e). If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may, within one year from the date of the occurrence of the violation, except as hereinafter provided, bring an action against the seller on account of the overcharge. In such action, the seller shall be liable for reasonable attorney's fees and costs as determined by the court, plus . . . (1) Such amount not more than three times the amount of the overcharge, or the overcharges, upon which the action is based, as the court in its discretion may determine. . . . Provided, however, that such amount shall be the amount of the overcharge or overcharges . . ., if the defendant proves that the violation of the regulation, order, or price schedule in question was neither wilful nor the result of failure to take practicable precautions against the occurrence of the violation. For the purposes of this section the payment or receipt of rent for defense-area housing accommodations shall be deemed the buying or selling of a commodity, as the case may be; and the word "overcharge" shall mean the amount by

which the consideration exceeds the applicable maximum price.

SAVING PROVISIONS. See also Sec. 1 (b) re: Prosecutions and suits. Sec. 206. Any price schedule establishing a maximum price or maximum prices, issued by the Administrator of the Office of Price Administration or the Administrator of the Office of Price Administration and Civilian Supply, prior to the date upon which the Administrator provided for by Section 201 of this Act takes office, shall, from such date, have the same effect as if issued under section 2 of this Act until such price schedule is superseded by action taken pursuant to such section 2. . . . All such price schedules shall be reprinted in the Federal Register within ten days after the date upon which such Administrator takes office.

DEFINITIONS Sec. 302. As used in this Act—

(a) The term "sale" includes sales, dispositions, exchanges, leases, and other transfers, and contracts and offers to do any of the foregoing. The terms "sell", "selling", "seller", "buy", and "buyer", shall be construed accordingly.

(b) The term "price" means the consideration demanded or received in connection with the sale of a commodity.

(c) The term "commodity" means commodities, articles, products and materials. . . .

(d) The term "defense-rental area" means . . . any area designated by the Administrator as an area where defense activities have resulted or threaten to result in an increase in the rents for housing accommodations inconsistent with the purposes of this Act.

(e) The term "defense-area housing accommodations" means housing accommodations within any defense-rental area.

(f) The term "housing accommodations" means any building, structure, or part thereof, or land appurtenant thereto, or any other real or personal property rented or offered for rent for living or dwelling purposes (including houses, apartments, hotels, rooming or boarding house accommodations, and other properties used for living or dwelling purposes) together with all privileges, services, furnishings, furniture, and facilities connected with the use or occupancy of such property.

(g) The term "rent" means the consideration demanded or received in connection with the use or occupancy or the transfer of a lease of any housing accommodations.

(h) The term "person" includes an individual. . . .

(i) The term "maximum price", as applied to prices of commodities means the maximum lawful price for such commodities, and the term "maximum rent" means the maximum lawful rent for the use of defense-area housing accommodations. Maximum prices and maximum rents may be formulated, as the case may be, in terms of prices, rents, margins, commissions, fees, and other charges, and allowances.

"B"

PERTINENT PROVISIONS OF
RENT REGULATION FOR HOUSING (10 F. R. 13528)

Sec. 1 (c). Effect of this Regulation on leases and other rental agreements. The provisions of any lease or other rental agreement shall remain in force pursuant to the terms thereof, except insofar as those provisions are inconsistent with this regulation.

Sec. 1 (d). Waiver of benefit void. An agreement by the tenant to waive the benefit of any provision of this regulation is void. . . .

Section 2. Prohibition against higher than maximum rents.

(a) General prohibition. Regardless of any contract, agreement, lease, or other obligation heretofore or hereafter entered into, no person shall demand or receive any rent for or in connection with use or occupancy on and after the effective date of regulation of any housing accommodations within the Defense-Rental Area higher than the maximum rents provided by this regulation; and no person shall offer, solicit, attempt, or agree to do any of the foregoing. . . .

Section 6 (a). Restrictions on removal of tenant. So long as the tenant continues to pay the rent to which the landlord is entitled, no tenant shall be removed from any housing accommodations, by action to evict or to recover possessions, by exclusion from possession, or otherwise, nor shall any person attempt such removal or exclusion from possession, notwithstanding that such tenant has no lease or that his lease or other rental agreement has expired or otherwise terminated, and regardless of any contract, lease, agreement or obligation heretofore or hereafter entered into which provides for entry of judgment upon the tenant's confession for breach of the covenants thereof or which otherwise provides contrary hereto, unless:

(1) Tenant's refusal to renew lease, or (2) Tenant's refusal of access to landlord; or (3) violating obligation of tenancy or committing nuisance; or (4) Subtenants on expiration of tenant's lease. The tenant's lease or other rental agreement has expired or otherwise terminated, and at the time of termination the occupants of the housing accommodations are subtenants or other persons who occupied under a rental

agreement with the tenant, and no part of the accommodations is used by the tenant as his own dwelling; or (5) revoked; or (6) occupancy by landlord.

Sec. 6 (b). No tenant shall be removed or evicted on grounds other than those stated above unless, on petition of the landlord, the Administrator certifies that the landlord may pursue his remedies in accordance with the requirements of the local law. . . .

Sec. 9 (a) General. The maximum rents and other requirements provided in this regulation shall not be evaded, either directly or indirectly, in connection with the renting or leasing or the transfer of a lease of housing accommodations, by way of absolute or conditional sale, sale with purchase money or other form of mortgage, or sale with option to repurchase, or by modification of the practices relating to payment of commissions or other charges or by modification of the services furnished with housing accommodations, or by tying agreement or otherwise.

(b) Purchase of property as condition of renting. Specifically, but without limitation on the foregoing, no person shall require a tenant or prospective tenant to purchase or agree to purchase furniture or any other property as a condition of renting housing accommodations *unless the prior written consent of the Administrator is obtained.* (Amdt. 67, 9-10-45.) (Italics supplied.)

Section 10. Persons violating any provision of this regulation are subject to criminal penalties, civil enforcement actions and suits for treble damages as provided for by the Act.

Section 13 (6). "Housing accommodations" means any building, structure, or part thereof, or land appurtenant

thereto, or any other real or personal property rented or offered for rent for living or dwelling purposes, together with all privileges, services, furnishings, furniture, equipment, facilities and improvements connected with the use or occupancy of such property.

(8) "Landlord" includes an owner, lessor, sublessor, assignee or other person receiving or entitled to receive rent for the use or occupancy of any housing accommodations, or an agent of any of the foregoing.

(9) "Tenant" includes a subtenant, lessee, sublessee, or other person entitled to the possession or to the use or occupancy of any housing accommodations.

(10) "Rent" means the consideration, including any bonus, benefit, or gratuity, demanded or received for or in connection with the use or occupancy of housing accommodations or for transfer of a lease of such accommodations.

DARK PAGE BLEEDTHRU

APPENDIX II

UNITED STATES OF AMERICA
Southern District of New York } ss.

I, William V. Connell, Clerk of the United States District Court for the Southern District of New York, do hereby certify that the writings annexed to this certificate have been compared with their originals on file and remaining of record in this office; that they are correct transcripts therefrom and of the whole of the said originals.

In Testimony Whereof I have hereunto subscribed my name and affixed the seal of the said Court at the City of New York, in the Southern District of New York, this 1st day of February in the year of our Lord one thousand nine hundred and fifty-two and of the Independence of the United States the One Hundred and Seventy-sixth.

(SEAL) WILLIAM V. CONNELL,
Clerk.

DARK PAGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

United States of America,

Plaintiff,

-against-

Edenor, Inc., Harry Cahn, "John" Grossman, (first name fictitious, true first name unknown to plaintiff, Edward Horrigan, Robert Charters, Gerry Charters, Julius Kanarek and Henry Winauer, and Robert J. Koechlin,

Defendants.

Civil 48-720

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Office of the Housing Expediter,
350 Fifth Avenue, New York 1, N. Y.
(William S. Hauser, Esq.,
Litigation Attorney)

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BLEEDTHRU

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(Meyer Levy, Esq., and Daniel M. Cowen, Esq., Of Counsel.)

LEIBELL, D. J.

The findings of fact in this case cover three transactions, all in the same apartment house, by which three tenants in possession were aided by the owner of the building in tieing-in a sale of their furniture to incoming tenants who were given possession, either under a new lease, as in the case of Klein, or by an assignment of an existing lease, as in the cases of Fitzpatrick and Appleman. Klein was required to pay Charters $2400 for furniture and furnishings which were not worth in excess of $1483.00. Fitzpatrick had to pay Koechlin $2000 for furniture and furnishings worth at the most $1305.00; and Appleman was obliged to pay Horrigan $2800 for furniture and furnishings worth not more than $1785.00.

The Koechlin deal took place November 3-5, 1947. When Koechlin decided to try to sell his furniture in connection with the occupancy of his apartment he had no lease from the owner Edenor, Inc. His old lease at $40.00 a month had expired January 14, 1947 and he continued on as a statutory tenant under the laws of New York. In that situation he had nothing to offer to a new tenant in connection with the sale of his furniture so he obtained from Edenor, Inc. a new lease at $46.00 a month, for the term of October 15, 1947 to December 31, 1948. The lease contained a type-

written clause that Koechlin could "sublease" the apartment at the same rental to a tenant meeting the approval of the landlord. His old lease contained no such provision. The right to sublet was included so that Koechlin could sell his furniture together with an assignment of the lease. This he promptly proceeded to do with the approval of the landlord and after he received a small down payment ($50.00) from Fitzpatrick they went to the landlord and there Koechlin assigned the lease to Fitzpatrick and Fitzpatrick assumed its obligations on November 3, 1947. Two days later at Koechlin's apartment Fitzpatrick paid the balance of $1950 and received from Koechlin the Edenor, Inc. lease and the assignment subscribed thereto by Koechlin. Fitzpatrick took possession and thereafter was recognized as the tenant by Edenor, Inc. Mr. Cahn, the president of Edenor, Inc. and Mr. Grossman, its agent, knew that the sale of the furniture was tied-in with the assignment of the lease and gave their full approval thereto. There is no proof of any actual payment of money to Cahn or Grossman or Edenor, Inc., but all three acted in collusion with Koechlin and aided him in carrying through the sale to Fitzpatrick which called for possession of the apartment as a condition of the payment of the excessive price exacted for the furniture. Without the full cooperation of Edenor, Inc. and its president, Harry Cahn, and its agent, Aaron Grossman, the deal could not have been consummated.

The Charters and Horrigan sales to Klein and Appleman respectively took place within a few days of each other in April 1948. Indeed there is a noticeable similarity in wording between the typewritten clause of the Bill of Sale of the furniture executed by Horrigan on April 25, 1948 and a corresponding paragraph of the Bill of Sale prepared by Charters earlier in April 1948 and executed by him on

April 27, 1948. Grossman, the agent of Edenor, Inc., was very close to both transactions and was present in each case when the new tenant received the Bill of Sale of the furniture.

The written lease Charters had received from Edenor, Inc. in November 1945 had expired about December 15, 1946. Thereafter Charters was only a statutory tenant at the old rental of $56 a month. He had nothing in the nature of a right of occupancy which he could assign to any incoming tenant. In order to sell his furniture attached to any right to occupy the apartment, Charters had to have the aid of the landlord, Edenor, Inc. This he arranged through Grossman, the agent of the landlord, and as part of the arrangement the landlord agreed to give an acceptible new tenant a lease at a 15% increase in rental.

Klein needed an apartment desperately. He even hired a real estate agent to find him one and paid the agent (Kanarek and Winauer) a fee of $200.00 for finding the Charters apartment, which Charters had advertised in a newspaper. Possession of the apartment was to go with the sale of the furniture. Klein paid $500.00 in cash, on account of the purchase price of $2400.00 about April 21st. This was before Klein saw Grossman or Cahn. Later Cahn approved of Klein as a tenant. On April 26, 1948, Edenor, Inc. executed a lease to Klein at $57.50 a month for a term expiring December 31, 1949. On April 27, 1948, Klein paid Charters the balance of $1900.00 and they then went to Grossman's office where Klein was given the lease by Grossman and was also given the Bill of Sale of the furniture. The sales price of the furniture was excessive. The tie-in of the sale of the furniture to Klein was accomplished by the joint and collusive acts of Charters, Cahn, Grossman and Edenor, Inc. Although Klein testified that Charters

said he had to give Grossman $500.00 of the amount paid for the furniture there is no proof of the actual payment.

Horrigan's sale of the furniture of his apartment to Appleman was also accomplished with the aid and collusion of Edenor, Inc., Cahn and Grossman. In November 1945 Mrs. Horrigan had obtained a one year's lease which expired December 15, 1947. The rental was $38.00 a month. When it expired she continued on as a statutory tenant. On August 29, 1947 she obtained a new lease for a term expiring September 14th, 1949 at an increase in rental of 15%. The lease did not contain any assignment clause. Early in April 1948, because of the death of her father, she and her husband decided to move in with her mother who had a six room apartment in another part of the Bronx. Through Grossman it was arranged that Edenor, Inc. would consent to an assignment of the Horrigan lease of Apartment C at 2805 University Avenue. Mrs. Horrigan thereupon advertised her three room apartment "lease $43; furniture $2,800; subject OHE approval". The last clause about the OHE approval was added by the newspaper before it would accept the advertisement.

The Applemans were also desperately in need of an apartment. They read the advertisement and by appointment saw the apartment. They could not get the Horrigans to reduce the price so they agreed to pay the $2800. An appointment was then made through Grossman for the Applemans and the Horrigans to see Mr. Cahn, the president of Edenor, Inc. At Mr. Cahn's office on April 22, 1948, Mrs. Horrigan assigned her lease to Appleman with the written approval of Edenor, Inc. and Appleman assumed in writing the performance of the terms of the lease. Appleman did not get any copy of the lease or assignment at that time. An appointment was made for April 25th at

the Horrigan apartment. There Appleman paid the $2800 to Horrigan who delivered a bill of sale of the furniture and Grossman delivered to Appleman the lease with the Horrigan assignment and the approval of the landlord subscribed thereto.

Horrigan could not have sold the furniture together with the assignment of the lease without the cooperation of the landlord, Edenor, Inc. and of Cahn and Grossman. The whole deal, the assignment of the lease and the sale of the furniture, was the result of the action collusively taken by the Horrigans, Edenor, Cahn and Grossman. Cahn knew all about the sale of the furniture. Grossman helped consummate it. The tie in of the sale of the furniture to the assignment of the lease was the result of their joint acts. It was a single deal.

The furniture in each instance was, at the time of the sale, worth about one-third less than its original cost figure asserted by the defendants who owned the furniture. Any amount paid in excess of about two-thirds of this claimed original cost was excess rent. In the Charters-Klein sale the original cost of the furniture was $2,224.43 and at the time of the sale to Klein this furniture had a fair market value of $1,483.00. The $2,400.00 paid as the "purchase price" for the furniture thus represented an excess rent overcharge of $917.00 in this instance. In the Koechlin-Fitzpatrick sale the original cost of the furniture was $1,957.00 and at the time of the sale to Fitzpatrick this furniture had a fair market value of $1,305.00. The $2,000.00 paid as the "purchase price" by Fitzpatrick for the furniture thus represented an excess rent overcharge of $695.00. In the Horrigan-Appleman sale the original cost of the furniture was $2,636.32 and at the time of the sale to Appleman this furniture had a fair market value of $1,758.00. The $2,800.00 paid as the "purchase price" for the

furniture thus represented an excess rent overcharge of $1,042.00.

It was the clear intent and purpose of the Federal Housing Regulations to prevent transactions by which a prospective tenant could be forced to buy furniture in order to obtain housing accommodations. So that the Housing Expediter might examine any such deals in advance of their consummation the Regulations required his prior approval thereof so that a prospective tenant could not under the guise of a purchase of furniture at an excessive price be required to pay something in addition to the registered rent of the housing accommodations.

The Statute and Regulations.

The following are in pertinent part the Statutes and Regulations relevant to this case:

The Housing and Rent Act, Section 206(b).

(b) Whenever in the judgment of the Housing Expediter any person has engaged in or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of this Act, or any regulation or order issued thereunder, the United States may make application to any Federal, State, or Territorial Court of competent jurisdiction for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing that such person has engaged or is about to engage in any such acts or practices, a permanent or temporary injunction, restraining order, or other order shall be granted without bond."

Section 204(d).

"The Housing Expediter is authorized to issue such regulations and orders, consistent with the provisions of this title, as he may deem necessary to carry out the provisions of this section and section 202(c)."

NEW YORK CITY CONTROLLED HOUSING RENT REGULATIONS, OCTOBER OF 1947, AS AMENDED.

Section 8—EVASION

"(b) *Purchase of property as condition of renting.* Specifically, but without limitation on the foregoing, no *person* shall require a tenant or prospective tenant to purchase furniture or any other property as a condition of renting housing accommodations unless the prior written consent of the Expediter is obtained."

DEFINITION OF RENT.

Section 1.

"'Rent' means the consideration, including any bonus, benefit or gratuity demanded or received for, or in connection with the use or occupancy of housing accommodations or the transfer of a lease of such accommodations."

Section 2.

"PROHIBITION AGAINST HIGHER THAN MAXIMUM RENTS—(a) *General Prohibition.* Regardless of any contract, agreement, lease, or other obligation heretofore or hereafter entered into, no *person* shall offer, demand or receive any rent for or in connection with the use or occupancy on and after the effective date of this regulation of any housing accommodations within the defense rental area higher than the maximum rents provided by this regulation; and no person shall offer, solicit, attempt or agree to do any of the foregoing. A reduction in the services, furniture, furnishings or equipment required under Section 3 of this regulation shall constitute an acceptance of rent higher than the maximum rent. Lower rents than those provided by this regulation may be demanded or received."

Section 8(b) is not limited to landlords who are owners of the building or have a lease with an unconditional right of assignment and who attach a tie-in sale of furniture to the leasing of premises. The prohibition of the section is broader than that. It says "no person" shall do so. That would include a tenant working in collusion with a land-

lord, the furniture being the property of the tenant whose occupancy of the premises the purchaser of the furniture acquires through the collusive cooperation of the landlord, who knows of the tie-in sale and who gives to the incoming tenant a new lease or gives his consent to an assignment of the tenant's lease. Any other interpretation of the regulation would be destructive of its purpose and create a loophole through which deals such as those collusively accomplished by the parties now before the Court could escape.

Nor is it necessary to show the payment of anything of value to the landlord. In the case at bar, as part of the arrangement the landlord received a permissible 15% increase in rent in the Charters and Koechlin deals. He could have received that legally from any new tenant. However he knew of the tie-in sale of the furniture and because some act on his part was required to make the tie-in sale a part of the rental to the new tenant the deal is illegal, and the landlord and the selling tenant should both be held for the excessive amount exacted for the sale of the furniture. It is excess rent required as a condition of the renting even though the landlord himself may not have received any part of it. Although I have a strong suspicion that the landlord's cooperation was not given gratuitously there was no direct proof of any actual payment to the landlord.

The plaintiff is entitled to a decree containing the injunctive relief sought together with a provision ordering those who were involved in each illegal transaction to pay over to the plaintiff the excess in the price exacted on the sale of the furniture at the time of the sale. *Porter* v. *Warner Holding Co.*, 328 U. S. 395; *Small* v. *Schultz*, 173 F. 2d 940. *Woods* v. *William A. White & Sons*, 172 F. 2d 356, which considered real estate agents' commissions and not tie-in sales of furniture, is not to the contrary. The same is true of *Auerback* v. *Fleming*, 161 F. 2d 207.

Findings of Fact and Conclusions of Law have already been filed herein. The following paragraphs are quoted from the Conclusions of Law:

> "IV. The plaintiff is entitled to a decree enjoining the defendants, Edward Horrigan, Robert Charters, Gerry Charters, Robert J. Koechlin, Edenor, Inc., Harry Cahn and Aaron Grossman, from violating the Housing and Rent Act of 1947, as amended, and the Regulations issued pursuant thereto."
>
> "V. The plaintiff is entitled to a decree containing a provision—
>
> (a) ordering the defendants, Edenor, Inc., Harry Cahn, Aaron Grossman and Robert Charters and Gerry Charters to refund to Joseph N. Klein the sum of $917.00;
>
> (b) ordering the defendants, Edenor, Inc., Harry Cahn, Aaron Grossman and Robert J. Koechlin, to refund to Patrick Fitzpatrick the sum of $695.00; and
>
> (c) ordering the defendants, Edenor, Inc., Harry Cahn, Aaron Grossman and Edward Horrigan to refund to Herman G. Appleman the sum of $1042.00; said refunds to be made by payment thereof to the plaintiff."
>
> "Let a decree and judgment be entered as hereinabove provided, together with the costs of this action to be taxed against the defendants."

Settle a decree accordingly.

aDted, May 22nd, 1950.

VINCENT L. LEIBELL,

Dated, May 22nd, 1950.

DARK PAGE BLEEDTHRU

Office - Supreme Court, U. S.
FILED
APR 15 1952
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1951

No. 594

PAUL D. LYNCH,
Petitioner,

vs.

HOWARD J. GRUBER and ISABEL GRUBER,
husband and wife,
Respondents.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

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Dated: Chicago, Ill., April 10, 1952.

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States.

Your petitioner, Paul D. Lynch, respectfully prays that the Court grant a rehearing of the order entered March 31st, 1952, denying his petition for writ of certiorari to review a final judgment of the Supreme Court of the State of Washington (Rec. 150). There are substantial grounds available to petitioner although not previously presented which justify such action.

I.

JURISDICTION.

In the first place it is possible that this Court denied the petition for writ of certiorari on the ground petitioner did not affirmatively show in his original petition that this Court had jurisdiction to review the case this Court having held in *Gorman* v. *Washington University*, 316 U.S. 98, 101, 62 S. Ct. 962, 89 L. Ed. 1293, that where a state court decides a case in division that the court *en banc* is the highest court of the state in which a decision could be had within the meaning of the jurisdictional statute and if it does not affirmatively appear petitioner "made application" as he "could have done" "to transfer the cause to the court for full review" the Supreme Court of the United States has no jurisdiction to review the case, the decision of the Supreme Court of Washington in the instant case having been rendered by Department Two of that Court and not by the Court sitting *en banc* (Rec. 132) and petitioner in his original petition (Jurisdiction, page 2) not having negatived that the case was susceptible of review by the full court sitting *en banc*.

The following statement includes facts previously omitted which negative that the case was susceptible of review by the Supreme Court of Washington sitting *en banc*.

The opinion of the Supreme Court of Washington was rendered and filed August 5th, 1951, by Department Two of that court (Rec. 132). A petition for rehearing was filed September 7th, 1951 (Rec. 134) stating "Appellant prays that if this petition for rehearing be granted that the court hear and determine the case *en banc*" (Rec. 134). The petition for rehearing was denied October 3rd, 1951 (Rec. 150), and judgment was entered on that date (Rec. 150). Time

for filing a petition for writ of certiorari, which would otherwise have expired January 2nd, 1952, was extended to and including February 15th, 1952, by order of Mr. Justice Douglas dated December 20th, 1951 (Rec. 154).

The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

An examination of the Rules of Court of the Supreme Court of Washington, 34a Wn 2d 5, reveals that no litigant has any right to demand that his cause be heard by the court *en banc* and that any request for such hearing is directed to the discretion of the court. Rule 4 provides "Hearing *en banc* • • • may be set by the court *in its discretion* at such other times *as the court may order*." (Italics ours.) (34a Wn 2d 5). Rule 6 provides: "Each of the departments shall have the power to hear and determine causes and all questions arising therein, subject to the provisions in relation to the court *en banc*." (34a Wn 2d 5). Rule 7 provides: "The Chief Justice shall from time to time apportion the business of the departments, and may, *in his discretion* [italics ours], before a decision is filed in the office of the clerk, order any cause pending before the court to be heard and determined by the court *en banc*. Any four judges, at any time before the filing of a decision in the office of the clerk by a department, may order a cause to be heard *en banc*." (34a Wn 2d 5). Rule 15 provides: "The Chief Justice, or any four judges, may convene the court *en banc* at any time, and the Chief Justice shall be the presiding judge of the court when so convened • • • and every decision of the court whether rendered *en banc* or by a department shall be final thirty days after its filing, unless during such period a petition for rehearing be filed. The filing of such petition within such period shall have the effect of suspending the decision until disposed of by the concurrence of five judges: • • • Whenever

a decision shall become final as herein provided, a judgment shall issue thereon." (34a Wn 2d 7-8).

The order denying the petition for rehearing is signed by "F. W. Schwellenbach, Chief Justice" (Rec. 150) and in the light of Rule 15 just quoted is apparently the action of the full court.

Petitioner exhausted his remedies in the State of Washington and this Court has jurisdiction to review the case. The holding in *Gorman* v. *Washington University*, 316 U.S. 98, 101, 62 S. Ct. 962, 89 L. Ed. 1293 has no application.

II.

FINDINGS OF FACT.

In the second place it is possible that this Court denied the petition for writ of certiorari on the basis of the general rule that findings of fact by state courts will not be re-examined. The answer to that position is that the decision which this court is asked to review is the decision of the Supreme Court of Washington and that court made no findings of fact and did not concur in any finding of fact by the trial court but affirmed solely on the ground petitioner had not shown that a common law relationship of landlord and tenant existed between respondents and himself (Rec. 134) which is admitted. If the findings made by the trial court are to be considered this Court "will review the findings of facts by a state court * * * where a conclusion of law as to a federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the federal question, to analyze the facts" (*Fiske* v. *Kansas*, 274 U.S. 380, 385-386; *United Gas Public Service Co.* v. *Texas*, 303 U.S. 123, 143; *Aetna Life Insurance Co.* v. *Dunken*, 266 U.S. 389, 394), and will

"reverse findings of fact by a trial court where 'clearly erroneous' " (*United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395), a finding being " 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been commtited." Here the facts and conclusions of law are intermingled and a mistake has definitely been committed.

III.

BASIC ISSUE—NATIONAL SUPREMACY.

In the third place the Court may have denied the petition for writ of certiorari on the ground that the immediate point in issue, i.e., whether it is or is not necessary for petitioner to establish that a common law relationship of landlord and tenant existed between respondents and himself in order for him to maintain an action and secure a judgment under the Emergency Price Control Act of 1942 (50 U.S.C. App. 901, *et seq.*), is not a matter of vital importance to the country as a whole or of great significance in the development of Federal jurisprudence although petitioner believes that it is.

But that question is insignificant in comparison with the real issue in this litigation: i.e., whether the Supreme Court of the United States can afford to permit a State through its judicial department to refuse to enforce a Federal law and regulation as written without doing something about it. If it was necessary for a writ of certiorari to issue in *Garrett* v. *Moore-McCormack*, 63 S. Ct. 246, 317 U.S. 239, it should issue in this case.

CONCLUSION.

For the foregoing reasons this petition for rehearing should be allowed and for the reasons stated in the petition for writ of certiorari the Court should order a writ of certiorari to issue in this case.

Respectfully submitted,

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Dated: Chicago, Ill.,
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